IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO. 15 OF 2001.

1. Shri Alcanso Barreto, and
   his wife:

2. Smt. Cristina Barreto.

4. Smt. Imelda Barreto.

5. Smt. Aleluia barreto,
   and her husband,

6. Shri Socorro Silva (expired)
   represented by:

   a. Smt. Regina Silva,
      married, major.

   b. Shri Dominick Silva,
      bachelor, major.

   c. Smt. Suzy Silva,
      married, major.

   d. Shri Geraldo Silva,
      bachelor, major.

   e. Kum. Celina Silva,
      spinster, major.

7. Shri Joaquim Barreto,
   and his wife:

8. Smt. Myra Barreto,
   all residing at Navelim,
   Colmorod, Salcete, Goa. ... Appellants.

VERSUS

1. Shri Camilo Lourenco Rebelo
   and his wife,

2. Smt. Alexandrina Rebelo,
   both residents of H.No.456,
   Dongrim, Navelim, Salcete.

3. Shri Caitano Rebelo;
   and his wife,

4. Smt. Rosy Rebelo.

5. Smt. Maria Deodita Rebello,
   and her husband,

6. Shri Roque Clemente Fernandes,
   residents of House No. 191,
   Calata, Majorda, Salcete, Goa. ... Respondents.

Shri S.D. Lotlikar, Senior Advocate with Shri S.Y. Thali, Advocate for the Appellants.

Shri Sudin M. Usgaonkar and Ms. R. Kamath, Advocates for the Respondents.

CORAM: N.A. BRITTO, J.

Date: 13/19th August, 2004.

ORAL JUDGMENT:

The plaintiffs in S.C.S. No.159/1987 have filed this Second Appeal. The parties hereto shall be referred to in the names as they appear in the cause title of the suit.

2. Briefly stated, the plaintiffs were residing in the property of the defendants and the defendants having filed a suit for demolition of extensions made by the plaintiffs, the said Suit No.166/76 was decreed, and while execution proceedings were pending, the plaintiffs and the defendants entered into an agreement of sale dated 21.7.1979. The said agreement was subsequently extended. The said agreement was particularly entered into between the defendants and Smt. Rosa Caetana Carneiro e Barreto , the late mother of plaintiff No.1. As per the said agreement the plaintiffs (prospective purchaser - the said Smt. Rosa) was to pay to the

prospective vendors (the Defendants) the balance amount of sale price of Rs.33,000/- only on or before 21.7.1982 and the said Smt. Rosa was to inform and intimate the prospective vendors the date on which she would be ready to make payment of balance amount of sale price and thereafter the prospective vendors would inform and intimate the said prospective purchaser the time, the date and the place of executing the sale deed. The defendants sent a letter to the said Smt. Rosa dated 19.11.83 (the receipt of which is the main bone of contention between the parties). The said letter was sent through Advocate Shri Joao Filipe Borges and by virtue of the said letter the defendants brought to the notice of the said Smt. Rosa that she had not cared to pay the balance of the purchase price and get the sale deed executed in her favour and inspite of that the defendants were willing to give her an opportunity to get the sale deed executed in her favour on payment of the balance of Rs.33,000/-. The said Smt. Rosa was therefore called upon by virtue of the said letter to make the payment within ten days from the receipt of the notice (dated 19.11.1983) and to come along with necessary stamp duty to enable the defendants to execute the sale deed. The said Smt. Rosa was further informed that the defendants would treat the agreement as rescinded in case she failed to comply with the notice further informing her that she would also forfeit a sum

of Rs.5000/- paid by her.

3. Thereafter the plaintiffs sent a letter dated 31.7.1987 to the defendants reminding them about the agreement dated 21.7.79 and further alleging that their mother the said Smt. Rosa had approached them several times but on one pretext or another, the agreement could not materialise and therefore extensions were granted to them. The plaintiffs (plaintiff No.3) by virtue of the said letter also called upon the defendants to finalise the sale deed as early as possible as the amount mentioned therein was kept ready long back.

4. The defendants (defendant No.5) sent a reply stating that the plaintiffs' letter dated 31.7.1987 was only a mischievous justification for the faults on their side. The defendants further stated that only because they had no money that the sale deed was not executed in due time and that they had written a letter dated 19.11.83 to the said Smt. Rosa through their advocate which was not claimed, stating that they could not remain for long without executing the sale deed though the delay was provoked on their side. The defendants nevertheless informed the plaintiffs that the price of the property had increased considerably and the owners of the property, though not bound to execute the sale deed, with the right to forfeit the money received in

advance, they were prepared to execute the sale deed in case they agreed to pay Rs.40/- per sq.m. for an area of 300 sq.m. and Rs.100/- per sq.m. for the remaining area of the property and in case the proposal was agreeable to them, they should reply within eight days from the receipt of the said letter, failing which the original agreement for sale would be considered inoperative and the advance money received would be forfeited.

5. The plaintiffs then filed the suit alleging that at the time of execution of the agreement, the possession of part of the property was given to the said mother of the plaintiffs and consequent to which the late mother of the plaintiffs did plantation of coconut saplings, flower plants and two bamboo islands. The plaintiffs further alleged that since the defendants could not obtain 'No Objection' from the South Goa Planning and Development Authority, Margao they have extended the agreement on 17.7.1982 until further notice. That the plaintiffs' mother Smt. Rosa had approached the defendants on number of occasions for execution of the sale deed which did not materialise and that the plaintiff no.3 came to know that the defendants had obtained the NOC from the S.P.D.A. on 7.8.1987 and accordingly the plaintiff no.3 had sent a notice to the defendants calling upon them to execute the sale deed as

per the agreement. The plaintiffs therefore prayed, inter alia, for a direction to the defendants to execute the sale deed, as agreed upon.

6. The defendants contested the suit stating that it is the said Smt. Rosa who was interested in getting the said extension, alleging lack of money to pay. The defendants further stated that the plaintiffs were not entitled now to get executed the proposed sale deed or the specific performance of the agreement for sale. The defendants further pleaded that in order to help the plaintiffs or their mother, the defendants had obtained the N.O.C. from the said S.P.D.A., Margao on 14.6.80 and again on 3.8.82 and even on 24.7.87, but the sale deed was not executed on the side of the plaintiffs because they always alleged that they did not have in their hands the necessary purchase amount. The defendants further pleaded that since many years had lapsed, the defendants had made the plaintiffs a new proposal in their reply to the letter of the plaintiffs dated 31.7.1987 which was received by the plaintiff No.3 on 12.8.1987. The defendants also stated that there was no cause of action for the plaintiffs at all to file the suit and therefore the suit deserved to be dismissed.

7. The learned Civil Judge, Senior Division by his judgment/decree dated 1.3.1999 decreed the suit of the

plaintiffs and directed the defendants to execute the sale deed in favour of the plaintiffs upon the plaintiffs depositing in the Court an amount of Rs.33,000/-.

8. The defendants having appealed against the said judgment/decree of the learned Civil Judge, S.D., the defendants filed an application dated 18.8.99 seeking leave of the first appellate court to produce the said letter dated 19.11.83 with A.D. stating that they had given a notice for execution of the sale deed by virtue of the said letter. The defendants stated that the said letter was referred to by DW.1 in her deposition but by oversight it was not exhibited.

9. The learned first appellate court by its Order dated 21.1.2000 allowed the said application of the defendants in terms of O.41 R.27 C.P.C.and remitted the records of the suit to the learned Civil Judge S.D. with the direction to take on record the said letter dated 19.11.1983 and to take further evidence restricted to the said letter only of DW.1 by giving opportunity to the plaintiffs to cross-examine DW.1 on the point and also to adduce rebuttal evidence, if any, and then to send the records back to him.

10. Accordingly the said letter was produced by DW.1

and the plaintiffs also cross-examined DW.1 in respect of the said letter.

19TH AUGUST, 2004.

11. The plaintiffs' contention that the learned first appellate Court could not have allowed the defendants' application for production of the said letter may be at the most a question of law but it is certainly not a substantial question of law to be entertained in this second appeal. That apart, although the plaintiffs had pleaded that the cause of action arose on 13.8.1987, the defendants had pleaded that the plaintiffs had no cause of action at all and therefore the suit ought to be dismissed with costs. The defendants had also pleaded that the Plaintiffs were now not entitled to get executed the proposed sale deed or the specific performance of the agreement. Not only that the defendants had also pleaded that they had even proposed to get the encroachments demolished which were made by the plaintiffs, as decreed by the Court and that the plaintiffs were trying to deviate from the right position, since they had failed to purchase the plot in proper time and even subsequently and therefore they themselves had to be blamed for the inexecution of the sale deed. As far as the said letter dated 19.11.1983 was concerned, the defendants had relied on the same in

their list of documents. Prior to that the defendants had referred to it in their reply to the notice of the plaintiffs dated 31.7.1987. The plaintiffs themselves had also referred to the said letter dated 19.11.1983 addressed to the said Rosa Carneiro e Barreto in para 15 of their plaint. It is relevant to note that although the plaintiffs referred to the letter dated 19.11.1983 the plaintiffs did not aver that the said Smt. Rosa had not received the same. In such a situation the learned first appellate Court was fully justified in allowing the defendants to produce the said letter within the meaning of the expression "or for any other substantial cause appearing in clause (b) of sub-rule (1) of Rule 27 of Order 41 C.P.C." The learned first appellate Court has rightly come to the conclusion that the envelope containing the said letter had dates like 24.11.83 and 25.11.83 with the endorsement: "Not claimed. Return to the sender" and the postal stamp showed the date of Nuvem Post Office December, 1983 which was received back by Nuvem Post Office for returning it back to the sender. These are the findings of fact arrived at by the learned first appellate Court which cannot be allowed to be agitated in this Second Appeal. The learned first appellate Court had rightly concluded that the said envelope pertained to none other than the letter dated 19.11.83, the receipt of which the plaintiffs had not denied inspite of the fact that the

plaintiffs themselves had chosen to refer to the same in their plaint.

12. The contention that all the plaintiffs ought to have been sent the said letter is totally misconceived because only the said Smt. Rosa was a party to the said agreement of sale. The learned first appellate Court rightly concluded that the plaintiffs should be deemed to have knowledge of the said letter dated 19.11.83. In the case of **Shri Joao Batisto do Perpetuo Socorro da Costa and Ors. v. Shri Joao Cruz Miranda and another** (2001 (1) Goa L.T., 378) it has been stated by this Court that a postal endorsement "unclaimed" can be said to be a sufficient notice. This decision was rendered based on another decision in the case of **P.K.Kowli v. Narayan Mahale** (1981 Mah. L.J. 355). In this case reference was also made to the case of **K. Bhaskaran v. Sankaran Balan** (1999 (8) Supreme Today, 608), wherein the Apex Court had taken the view that in a case where the sender had despatched the notice by post with correct address written on it, then it could be deemed to have been served on the sender unless he proves that it was not really served and that he was not responsible for such non-service. At the cost of repetition it may be stated that it was never the case of the plaintiffs that their mother the said Smt. Rosa had not received or had no knowledge of the said notice dated 19.11.83.

13. The next contention that the learned first appellate Court could not have allowed to produce the said letter dated 19.11.83 because there were no pleadings to that effect also has got to be rejected. I have already referred to the necessary pleadings of the defendants, by which they had clearly and inter alia stated that the plaintiffs who had failed to purchase the plot in proper time and even subsequently and it is in order to prove such a plea that the defendants had relied upon the said letter. The contention that the said letter could not be allowed to be produced, in the absence of pleadings, has got to be rejected.

14. Lastly, it is the plaintiffs' contention that limitation is a mixed question of law and facts and unless it was so taken by way of plea raised in the written statement, it is deemed to have been waived or not raised at all. Shri Lotlikar in support of his submission has placed reliance on the case of **Braham Dutt v. East Punjab Province and others** (A.I.R. 1958 Punjab, 351). In this case it has been held by a Division Bench of the Punjab High Court that the mere fact that pleas with respect to the suit being barred by limitation or under Section 19 of (East Punjab Evacuees' (Administration of Property) Act (14 of 1947) were raised by the defendants would be of no avail, in the absence of a clear statement of facts on which these

pleas could be based. The Court further held that no amount of evidence can be taken into consideration or regarded as sufficient in proof of any fact, if specific mention of it is not made in the pleadings. To repel the said submission of Shri Lotlikar, Shri Usgaonkar, the learned counsel has placed reliance on the case of **Municipal Council, Ahmednagar and another v. Shah Hyder Beig and Others** [(2000) 2 S.C.C. 48]. In this case the Supreme Court stated that while it is true that the plea of limitation ought to be raised at the first available opportunity but that does not mean and imply that the party raising it even during the course of hearing would be barred therefrom. Limitation is a mixed question of law and fact. Time-barred claim would not even be entertained by a civil court without there being any opportunity of filing a pleading by the respondents or the defendants in a civil suit. The Supreme Court further observed that the fact remains that the appellants had in fact agitated the point of limitation during the course of hearing and also had taken the plea in their affidavit-in-reply and prior to the commencement of the hearing of the matter and therefore the High Court was thus clearly in error in holding without any further factual detail that the cause of action for the challenge to the notification under the Maharashtra Act of 1966 continued even on the date of filing of the writ petition.

15. In my view this last submission made on behalf of the Plaintiffs canot be accepted in as much as the observations of the Division Bench are also not attracted to the facts of this case.

16. In this case the Defendants had clearly pleaded that the Plaintiffs had no cause of action to file the suit. The Defendants had further pleaded that the Plaintiffs were now not entitled to get executed the proposed sale deed nor the specific performance of the agreement and in support of the same had produced the said letter dated 19.11.83 which pleas were considered by the Court in the light of Art.54 of the Limitation Act.

17. Section 3 of the Indian Limitation Act 1963, provides that subject to the provisions contained in Sections 4 to 24 (both inclusive) every suit instituted, every appeal preferred, an application made after the prescribed period shall be dismissed although limitation has not been set up as a defence. In my opinion, a plea of limitation can be raised at any stage even before the first appellate Court as long as it can be determined on facts which have been proved by the respective parties. Here was a case where the defendants by virtue of the said letter dated 19.11.1983, written to the said Smt. Rosa Carneiro e Barreto had clearly informed her that

she had not cared to pay the balance of the purchase price and get the sale deed executed in her favour. By virtue of the said letter, she was given ten days to come with the necessary stamp paper for execution of the sale deed failing which the defendants would treat the agreement as rescinded. The defendants having treated the said agreement as rescinded, the said Smt. Rosa not having performed her part of the agreement, the defendants were fully justified in pleading that the plaintiffs by virtue of the said letter had no cause of action to file the present suit. The learned first appellate Court has rightly dismissed the suit filed by the plaintiffs as barred by limitation.

18. Consequently I find there is no merit in the Second Appeal which is hereby dismissed with costs.

N.A. BRITTO, J.

sl.